

USAWC STRATEGY RESEARCH PROJECT

**BUSHWHACKERS AND TERRORISTS: COMBATANT STATUS POLICY IN THE  
CIVIL WAR AND GLOBAL WAR ON TERROR**

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## **ABSTRACT**

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The presidential decisions made in the difficult days following 9/11 reflected a resolute determination on the part of the Bush Administration to pursue an elusive foe, an enemy unlike any the United States had faced as a nation before. One of these decisions was to treat Taliban and Al-Qaeda fighters captured during Global War on Terror (GWOT) operations as illegal combatants, thus not legally entitled to the protections afforded by the Geneva Conventions, and by extension, Prisoner of War (POW) status. This project analyzes US policy on GWOT combatant status by comparing it with Union policy covering the Guerilla fighters in the Border State region, particularly Missouri and Kansas, during the American Civil War. The study asserts that both sets of policy were deeply flawed, and that certain atrocities committed during both conflicts are directly traceable to policy blunders. The paper traces the evolution of Union policy, followed by an analysis of the legal stance taken by the Bush administration regarding combatant status and interrogation techniques. Finally, the paper suggests actions to reverse the damage done by existing policy in hopes of returning to a higher moral ground.



## BUSHWHACKERS AND TERRORISTS: COMBATANT STATUS POLICY IN THE CIVIL WAR AND GLOBAL WAR ON TERROR

The presidential decisions made in the difficult days following 9/11 reflected a resolute determination on the part of the Bush Administration to pursue an elusive foe, an enemy unlike any the United States had faced as a nation before. One of these decisions was to treat Taliban and Al-Qaeda fighters captured during Global War on Terror (GWOT) operations as illegal combatants, thus not legally entitled to the protections provided by the Geneva Convention, and by extension, Prisoner of War (POW) status. The administration was desperate for actionable intelligence in the wake of the 9/11 attacks, and withholding Geneva protections seemed vital to conducting the type of interrogations necessary to extract that information in a timely manner. This was not a rash decision, but rather reflected the careful thought of some of the best legal minds in the country. But was this wise policy?

Looking to history for lessons on previous US policy efforts to properly define combatant status, Union Army counterinsurgency efforts during the Civil War are instructive, particularly as that strategy was applied in the border states, especially Missouri and Kansas. During both the border war and GWOT, the US had great difficulty defining who was or was not a lawful combatant, and who should receive POW status. Problems enforcing the policies they did endorse only compounded the confusion. This analysis argues that combatant policy decisions made by both the Lincoln and Bush administrations were deeply flawed from a moral (if not legal) perspective. Both resulted in policies, and effects logically flowing from those policies, that resulted in the commission of atrocities, undermined American values at home and, in the case of GWOT policy, deeply damaged our image abroad.

This paper will outline the changing nature of Union policy during the Civil War as Union commanders struggled to suppress an insurgency on the border; how the ambiguity resulting from unclear combatant status policy led to atrocities against insurgents and especially civilians; demonstrate the US government's subsequent history of leadership in international Law of Armed Conflict (LOAC) development; review the legal reasoning behind the decisions made regarding GWOT combatant status; and lay out a moral argument for the way forward.

### The War on the Border: Anti-Bellum Issues and "Bleeding Kansas"

The War on the Border is often overlooked in Civil War historiography, with Napoleonic scale armies, major battles, and the emergence of total war as the key elements of the story. Most Americans remember Civil War insurgents, if at all, as vaguely romantic outlaws of the type popularized in post-war dime novels. In fact, the "Uncivil War" ranged the border from

Missouri to Texas, representing some of the most vicious fighting in the larger Civil War. It was often war without quarter, so damaging to the communities in which it took place that civil society virtually collapsed, often replaced with harsh military government.<sup>1</sup> Nowhere was the situation worse than on the Missouri-Kansas border.

Contemporary Missourians believed the war actually started with the Kansas-Nebraska Act, passed in 1854.<sup>2</sup> Kansas became the battleground of the state's rights and slavery debate, pitting neighbor against neighbor. Protective and raiding associations formed on both sides of the border, eventually resulting in escalating violence as both sides sought to influence the critical free state/slave state vote in Kansas. Well before 1861, slave stealing, arson, looting and murder were commonplace, not only in cross-border raids, but also between union supporters and southern sympathizers within the two states.<sup>3</sup> In 1861, effective Union actions to isolate Missouri's secessionist Governor in southwest Missouri had the unintended effect of trapping thousands of confederate sympathizers behind union lines, thus sowing the seeds for the ensuing insurgency.<sup>4</sup>

Even at this early stage in the war, these "Border Ruffians" and "Kansas Jayhawkers" began evolving into the Confederate sanctioned guerilla fighters and Union sanctioned militia units they would become, formalizing their ability to commit depredations while "settling old scores."<sup>5</sup> The population meanwhile, was caught in the worst possible situation. Enduring the hardships of large-scale conventional conflict was difficult enough, but the populations suffering through them elsewhere eventually received some respite as the conventional war stalled or moved on. For the border peoples, the end of conventional operations in an area only meant the resumption of unregulated violence associated with guerillas and the militias formed to fight them, whom often proved as bad as the guerillas themselves.

#### Union Policy: Problems of Definition:

The Union Army at the start of the Civil War made no distinction between conventional and guerilla tactics operationally, and the Union Army had no specific policy on how to treat guerillas.<sup>6</sup> Union Major General Henry Halleck, destined to play a huge role in counterinsurgency operations in the west as well as the broader war, recognized early on that policy was necessary for treatment of guerillas. An attorney and authority on international law, Halleck defined guerillas and partisans together as outlaws, subject to treatment as common "Bushwhackers and brigands."<sup>7</sup> This did little to establish sound policy however, because it simply muddled an already confusing problem of definition. Was there a need for any distinction between irregular fighters? Were a partisan, an outlaw, a brigand, or a bridge burner all the

same under the law? It is doubtful Halleck's early effort answered any of these questions for commanders on the ground, leading in many cases to these commanders (including Halleck himself) making their own policy on the fly. As Commander of the Department of the Missouri, Halleck became increasingly frustrated by his inability to stop guerilla activity in his department, especially the sabotage of telegraph lines and the burning of bridges. He issued General Order 32, which stated that bridge burners (a pejorative term supposedly applicable to all saboteurs) caught in the act could be summarily shot. Those accused (but not caught in the act) would face a military commission.<sup>8</sup> In January 1862, he issued General Order 1, which declared that insurgents were not legitimate soldiers, though vowing to protect uniformed soldiers.<sup>9</sup> Later in 1862, appointed to command of the Army of the Mississippi, Halleck issued General Order 2, declaring irregulars "outside the law," and directing that they be allowed "no quarter."<sup>10</sup> His peers did little better. On 30 August 1861, Major General John C. Fremont, as commanding general, ordered that all persons taken behind a line drawn from Fort Leavenworth to Cape Girardeau captured with weapons would be tried by courts-martial and shot.<sup>11</sup> Similarly, Major General John Pope issued his General Order 7, offering no distinction between types of guerillas, other than ordering that they be immediately shot.<sup>12</sup> These are but a few examples. As the various Union Army Departments were constantly reorganized, and as new commanders tried to deal with an increasingly effective threat behind their lines, they routinely issued General Orders such as these, using broad-brush language and imprecise terminology to define irregular combatants.

But why was the terminology important? Because it turned out that not all insurgents were the same. Certainly there were large numbers of groups who simply viewed the situation in the Border States as an opportunity to commit depredations on their fellow men (and women) and used "the cause" as an excuse. There were others that acted with perfidy, wearing captured Union Army uniforms to approach targets, then melting back into the civil population, all without warrant from the Confederate government. But there were also partisan raiders, acting under general or specific orders from Confederate officers, wearing confederate uniforms, and whose officers carried Confederate commissions. Colonel George Jesse and his men are one example — regular Confederate soldiers operating behind enemy lines with general directions on the type of missions they should undertake.<sup>13</sup> In some cases it is difficult to see how their mission, or their conduct, differed from regular Confederate Cavalry. Then there were a number of groups whose actions crossed several of these lines. How should they be defined in policy? Clearly, Union Army policy (or lack thereof) to this point did not help commanders make sound decisions.

### Union Policy: The Road to Atrocities

For the first two years of the war, the various departmental policies just described characterized both major theaters, leaning more toward harshness in the west where the guerilla problem was more severe. No national policy existed, though Lincoln frequently inserted himself when he felt his generals had gone too far, as he did with Fremont's extreme policy. We now turn to examining the effects of this ad hoc approach to policy, for the soldiers of both sides and the populace caught in between.

Brigadier General John McNeil had ten "bandits" executed on 18 Oct 1862, after raiders under Colonel J.C. Porter attacked his headquarters and murdered a prominent civilian. The Confederate Major General Sterling Price had sanctioned Porter's mission behind the lines, describing his men as "Partisan Rangers." Price complained bitterly about the executions, and the Confederates requested that General McNeil be remitted to their custody, for trial as a war criminal.<sup>14</sup> Was he? The policy at the time is unclear since the raiders (or partisans) operated slightly outside Halleck's General Order in that they did not wear military uniforms. The point is that no mechanism existed for adjudicating these cases other than the judgment of the commander on the ground. On the other hand, Union officers capturing insurgents often avoided implementing Halleck's policy by deliberately defining the detainees as something in between a criminal and a POW, essentially reflecting a tacit agreement not to execute captured insurgents for fear of retribution by Confederate forces.<sup>15</sup>

The lack of clear policy fell hard on the civilian population as well, as many Union commanders began to hold local civilian populations liable for the actions of guerillas, assuming that these forces could not operate without local support. Major General Pope was the first to enact such a policy, ordering a local county to pay all expenses of federal troops following an attack on one of his supply trains.<sup>16</sup> This was the first of many different schemes to require local compensation for guerilla activity. James Lane, commanding a brigade of Kansans, upon finding rebel supplies in the town of Osceola, Missouri, burned the town to the ground.<sup>17</sup> Brigadier General Thomas Ewing, Jr. arrested female relatives of various guerillas, and five of these women were killed when the building in which they were being held collapsed.<sup>18</sup> The actions of these two officers started a cycle of violence and hardship. Guerillas under William Quantrill, arguably the worst of the worst among the Guerilla leaders in terms of viciousness, led an attack on Lawrence Kansas during which 140 civilians were killed and 185 buildings burned, allegedly in retaliation for the burning of Osceola and the death of the five women. The Union reaction was swift, and Ewing issued General Order 11, ordering the depopulation of three



entire Missouri counties.<sup>19</sup> These policies, it should be noted, were all designed to make it more difficult for Quantrill to operate. Instead, he received even more support and was better able to wreak havoc and tie down Union forces. On the other hand, the civilian economies of much of Missouri were destroyed, and local governments completely destabilized.<sup>20</sup> These examples are intended to be an instructive (though by no means inclusive) representation of a few of the many cycles of violence, reactions to violence, and acts of retribution on civilian populations, all traceable to the predictable second and third order effects of a lack of national policy and poorly crafted and unevenly enforced local policy.

The first serious effort to establish national policy protecting certain categories of guerillas was the Lieber Code. Francis Lieber was a legal scholar chartered by Major General Halleck (by this point Commanding General of the Army) to formulate policy for the Lincoln administration. Lieber made distinctions between partisans (who wore regular uniforms and were attached to confederate forces), war-rebels (non-uniformed men who would return to the civilian populace), and armed prowlers (outlaws).<sup>21</sup> Lieber argued that only those defined as partisans would receive POW status, the others could be dealt with summarily (executed).

Lieber's code was adopted and promulgated in General Order 100, "Instructions for the Government of Armies of the United States in the Field," issued in April 1863.<sup>22</sup> The order rather narrowly defined the Partisan in such a way as to conform closely to a description of detached cavalry, but it was expansive in that it provided, for the first time, national level protection for irregular soldiers operating behind enemy lines. How did this new policy shape actions on the battlefield?

General Order 100 seems to have been largely ignored by Union commanders in the field. In fact, senior civilian and military leadership issued individual instructions to subordinates directly contradictory to the Lieber Code's distinction between partisan rangers and other irregular combatants. Ironically, this disregard for national policy was most evident in the Eastern Theater in the pursuit of Mosby's Rangers in the Shenandoah Valley.

John Singleton Mosby led a guerilla group that conformed more closely than any other to the partisan ranger units described by the Lieber code. Mosby's men wore uniforms, they were led by commissioned officers, and they operated under Confederate orders. By 1864, Mosby's unit was the only such unit that had not been officially absorbed by the Confederate Army.<sup>23</sup> Its unique status reflected its conduct (the poor conduct of many other Confederate guerillas had become a major embarrassment to Confederate leadership), as well as Mosby's effectiveness frustrating Union Army commanders.

Lieutenant General Ulysses S. Grant's actions in 1864 reflected the frustration he and Major General William Tecumseh Sherman were encountering trying to destroy Mosby. Grant authorized Sherman to deny combatant rights and encouraged summary execution without trial of any of Mosby's men Sherman caught, as well as suggesting that the families of Mosby's men could be held prisoner.<sup>24</sup> Secretary of War Edwin Stanton issued similar instructions to the Union commander at Martinsburg, Brigadier General William H. Seward, authorizing him to employ "any means that may within your power to accomplish" in order to defeat guerilla units.<sup>25</sup>

Union Cavalry officer Brigadier General George Armstrong Custer executed Mosby's men on several occasions. He hanged five of them in 1864, while wearing Confederate uniforms, and executed six more later that same year, believing Grant's and Sheridan's directives authorized his actions.<sup>26</sup> Custer could certainly have argued, had his actions ever been challenged, that he was operating with confusing and contradictory guidance, as was every other field commander in the Civil War.

Thus far, we have looked at Union combatant status policy during the Civil War as an example of a poorly developed and unevenly enforced policy debacle, directly resulting in atrocities committed against the combatants themselves and the civilian populace. We will now turn to an examination of US combatant status policy for GWOT, beginning with a broad review of American efforts to protect POWs in the international environment.

#### American Leadership in Developing LOAC

American participation in efforts to protect prisoners of war date at least to the 1785 Treaty of Friendship between the US and Prussia. This treaty represents one of the first international efforts to describe the obligations of the two parties involved in a conflict regarding treatment of prisoners.<sup>27</sup>

As previously demonstrated, Abraham Lincoln recognized the need for such guidelines during the Civil War, and directed the adoption of the Lieber Code as the rule of law for Union forces during the conflict. Not only did the code prescribe treatment of prisoners of war, it attempted to differentiate between legal and illegal combatants, recognizing the changing nature of warfare.<sup>28</sup> The important lesson here is that even in a time of great peril for our nation, and at a time Lincoln clearly did not want the Confederate government legitimized internationally, he nonetheless stepped forward to broaden the definition of legal combatants by extending protection to certain types of forces detached from main armies, such as partisans. Surely many of his advisors, military and civilian, argued the opposite view — that the government should not recognize *any* rebel soldiers as legitimate combatants.<sup>29</sup> And, as we have seen, the Lincoln

administration was not always successful in enforcing the code, particularly in the border states, where Lieber's code was arguably observed more often in the breach than the observance. Nonetheless, Lincoln's foresight is remarkable in that he recognized the long-term consequences of wartime actions as he sought to preserve the Union.

America fully participated in later efforts to define combatant status internationally, the most significant of which was the Second Hague Convention of 1907.<sup>30</sup> More germane to this analysis of course, are the four Geneva Conventions of 1949, written in the aftermath of World War II in hopes of filling the gaps existing in international law. In light of the legal analysis later in this paper, it should be noted that the Conventions were drafted carefully to apply as broadly as possible. The framers of Geneva, including the United States, were attempting to construct a set of rules that nations could not easily circumvent.<sup>31</sup>

The Third Geneva Convention is specifically intended to cover every aspect of the treatment of POWs, and its text was crafted to be easy to understand and very clear about who does and who does not receive POW status. In particular, the framers were concerned with preventing the treatment routinely accorded partisan fighters during World War II.<sup>32</sup> Subsequently, the Convention needed additional updating due to the changing nature of warfare. The Protocol Additional to the Geneva Conventions of 1949 (called Protocol 1) was written in 1977. This protocol recognized the fact that no Guerilla organization could possibly comply with all the requirements set forth in the earlier Conventions, recognizing certain conditions under which a civilian could maintain protected status, even if not wearing a distinctive uniform or openly carrying arms. The United States signed but did not ratify this protocol.<sup>33</sup> However, more than a decade prior to Protocol 1, the Johnson Administration opted in 1966 to treat Viet Cong prisoners as POWs as a matter of policy, despite the fact that they did not comply with any of the provisions articulated in Convention III.<sup>34</sup>

The LOAC historical experience of the United States in the international arena then, is a record to be proud of. Full participation in efforts to internationally regulate conduct during war, leadership in drafting guidance to cover the changing nature of combat, and most importantly, a willingness to expand the definitions of whom we consider legal combatants when existing guidance proves inadequate. Historically, we have erred, if at all, on the side of a more expansive view of combatant status than international law has required. This record should be kept in mind as this paper now turns to reviewing GWOT combatant status policy, specifically the legal reasoning justifying the current US position.

### Current Situation

US policy toward the treatment of detained members of the Taliban and Al-Qaeda represents a departure from previous US policy as well as the standing pre-war legal guidance to the US Armed Forces. Department of Defense Directive 5100.77 requires commanders to treat all detainees as POWs, unless determined to be otherwise by a competent tribunal.<sup>35</sup> Instead, the Bush administration immediately termed these detainees as “unlawful combatants,” not entitled to Geneva Convention protections or POW status, and made a deliberate decision that tribunals to determine POW status were not necessary. What was the legal reasoning behind these decisions?

Several legal arguments were offered on various aspects of this issue. One consistent argument dealt with whether Geneva should apply to the members of groups such as Al-Qaeda and the Taliban. Al-Qaeda, the reasoning went, was a non-state actor; therefore, Geneva did not apply, since only a state can act as a signatory to the Convention. Taliban fighters, while representing the only existing government in Afghanistan, were similarly not entitled to Geneva Convention protection because their government was not internationally recognized. And further, although Afghanistan was a signatory to the Geneva Conventions, it constituted a “failed state,” and as such was no longer a party to the Conventions, hence Geneva offered no protection for the Taliban fighters representing that state.<sup>36</sup>

This reasoning did not go unchallenged. Within the administration, Secretary of State Colin Powell and his legal advisor, William H. Taft, IV, argued strongly for adherence to the Geneva Convention, in particular to the necessity for conducting the “competent tribunal” required by the Convention III.<sup>37</sup> Powell was also very concerned about the issue of reciprocity, how captured US soldiers would be treated in this and future conflicts. Outside the administration, the administration’s legal reasoning was widely criticized in the press and among scholars of international law, particularly the rather less convincing argument for treating the Taliban fighters as illegal combatants. M. Cherif Bassiouni, Professor at DePaul University, is representative of many such critics. He challenges the assertion that Taliban fighters did not comply with the requirements of Convention III. They did carry arms openly. They were recognizable by their distinctive beards and turbans. They had an identifiable command structure. Further, he argues the framers anticipated just such debate, and required competent tribunals to decide each controversial case.<sup>38</sup> Bassiouni, and many other scholars, effectively deconstructed the administration’s legal reasoning on this issue. By February 2002, the Bush administration altered its position on the Taliban fighters, according them Geneva Convention protections but denying them POW status due to their close association with Al-Qaeda and

failure to comply with Convention III requirements. As well, this decision reflected the fact that granting POW status would imply the eventual release of the detainees at the “end” of the GWOT, possibly returning dangerous terrorists who would subsequently act again. This altered policy was implemented without individual consideration by tribunals.<sup>39</sup>

And yet, after carefully crafting legal opinions arguing that Geneva (or certain protections accorded by Geneva) do not apply, the administration consistently stated publicly that the US would, as a matter of policy, treat detainees humanely, within the principles of Geneva, even providing many of the privileges accorded to POWs.<sup>40</sup> Why go to all the trouble of abrogating Geneva if the US intended to comply with its humanitarian provisions? First, the administration wanted to maintain the ability to convene Military Commissions (a type of tribunal) to try detainees for crimes outside the jurisdiction of US courts. If the detainees had been granted POW status, that process would have to be the same as that accorded US military personnel, either in US courts or under the Uniform Code of Military Justice. Under the Military Commission approach, the burden of proof would be significantly lower, and the defendant’s rights less than that accorded to criminal defendants by the US Constitution.<sup>41</sup> As of this date, the conduct of these Commissions has been significantly delayed due to legal challenges and judicial review in US courts. Only a handful of detainees have been prosecuted under this authority as a result.

The second major reason the Bush administration sought to abrogate Geneva was the desire to acquire actionable intelligence from captured fighters. Certainly Geneva does not prevent interrogations, but POW status does prohibit the use of coercive techniques, methods the administration deemed necessary to fight what then White House Counsel Alberto Gonzales termed “...a new kind of war...[that] renders obsolete the Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”<sup>42</sup> Therefore, by keeping the detainees out from under the umbrella of Geneva, the administration established legally the ability to use coercive techniques. However, more was required in light of international law regarding torture (apart from Geneva) and US law enacted to support that international law.

The thrust of the legal opinions on this issue were that Presidential wartime powers embodied in the US Constitution overrode the International Convention Against Torture, as well as the relevant US statute banning torture. The President’s duty to protect the nation was said to reign supreme.<sup>43</sup> As a result, the Bush administration approved various coercive methods for implementation at the Guantanamo Bay Detention Facility, Cuba in specific cases. Several of these techniques then migrated to the Abu Ghraib Prison Detention Facility in Iraq, some with

explicit administration or Department of Defense approval, others without it. What was the result?

Media coverage began with the criticism of detainee policy previously mentioned, and rapidly intensified after the revelations of atrocities committed at Abu Ghraib and elsewhere, providing consistently negative reportage that simply did not go away. A simple Internet search will highlight nearly daily newspaper and journal articles, nearly all hostile to US policy (from early 2002 until the present day). Much recent writing in this arena ably demonstrates the systematic nature of the abuses committed by US military personnel, weakening to the point of collapse any argument that abuse was limited only to “a few bad apples.” Furthermore, many have directly blamed policy decisions with creating a climate where abuse was inevitable. For author Andrew Sullivan, the critical point was the decision to treat the detainees as “unlawful combatants” rather than prisoners of war. And in fact, he demonstrates that the qualifications the Bush administration added to public policy statements claiming detainees would be treated in accordance with Geneva, but only “to the extent consistent with military necessity,” sent the troops a mixed message: that these detainees were indeed something less than prisoners of war.<sup>44</sup> More broadly, the damage to our reputation internationally, particularly in the Middle East, is severe. The question remains, however, whether the means employed to achieve the objective of actionable intelligence was worth the cost of doing so.

To answer this question, one first has to establish whether or not coercive interrogation techniques work in general, and whether or not the techniques employed in this particular case were effective. Did the US receive any actionable intelligence from coercive interrogations? Almost certainly. But the more difficult question is whether interrogators would have been able to obtain that same information with less coercive methods, perhaps with more subtly trained interrogators. Author Mark Bowden, who seems to support coercive methods, reviewed the relevant research and concluded that the evidence for many techniques, from pain to drugs, is inconclusive at best. He did suggest, however, that fear is an effective technique, more effective than physical pain.<sup>45</sup> He also interviewed Michael Koubi, former Chief Interrogator for Israel's Security Service, the Shabak. Koubi asserted that well-trained interrogators rarely needed to resort to physical violence to get information. But what actually happened in the Occupied Territories was that once some level of coercion was allowed, every effort to regulate it (and prevent abuses) failed, leading to the subsequent 1999 ban on torture by the Israeli Supreme Court.<sup>46</sup> Given the fact that one could argue the US faced exactly the same threat and similar challenges, this would have been sage advice indeed.

Somewhere along the continuum of political debate and media coverage on this issue, our policy toward interrogation techniques was given the unfortunate moniker “Torture lite.” The evidence supporting the utility of the coercive techniques implemented by the Bush administration is far too weak to continue this policy in light of the general belief that we are in fact condoning torture. So, where should the US go from here?

### The Way Forward

The lawyers working for the Bush administration essentially answered the questions they were asked and found a way to provide the answers the administration wanted to hear. But in seeking legal advice, the administration asked, “what *can* we do?” rather than “what *should* we do?” Even though the wrong question was asked, senior military lawyers warned the administration about the pitfalls of current policy. Rear Admiral Michael Lohr, Judge Advocate General of the Navy, said “Will the American people find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values?”<sup>47</sup> His advice was quite prescient given the events that have unfolded since it was given.

More than anything else, US policy from this point forward must reflect a return to the high moral ground. Acting as if the Geneva Conventions and international prohibitions regarding torture only applied when both sides act in a manner consistent with humanitarian principles is a weak legal argument at best and completely unsupportable as a moral argument. Because the enemy did not abide by international law, the administration no longer felt bound by these obligations. We must do better. The United States is not at this enemy’s level, and we should not condone behavior that leads to abuses committed in our name.

The Bush administration must implement policy that is relevant to the soldiers on the ground charged with implementing it. The Geneva Conventions are extraordinarily complex, but the US military has written excellent guidance distilled from international law into manuals and guides soldiers can understand and follow. We direct them away from these standards at our peril. The famous prison experiment of Stanford University psychologist Phillip G. Zimbardo is instructive here. Even in a controlled environment, normal college students acted out their guard and prisoner roles so completely that the experiment had to be stopped.<sup>48</sup> At Abu Ghraib, the soldiers were guarding prisoners who meant them mortal harm. The compound was under regular attack, particularly from indirect fire. They were undermanned, inadequately led, and poorly trained for the mission at hand. They needed rock solid guidance that fully convinced

them their military and civilian leadership expected full compliance with the spirit and letter of Geneva, not memorandums suggesting that Geneva's provisions are "quaint."

### Conclusion

"Bloody Bill" Anderson, William Quantrill, and men of their ilk were not admirable men. They and their units committed every imaginable crime against civilians, mutilated the corpses of Union soldiers they had killed, and more generally acted in an unsavory manner deeply repulsive to regular officers on both sides of the Civil War. It is no surprise that they were hunted down unmercifully and shot on sight. But the means of doing so were extraordinarily clumsy, reflecting ill-conceived local policy determined by local commanders early in the war, followed by more reasonable, but poorly enforced federal policy after 1863. Moreover, men such as John Mosby and his Rangers were treated as bandits, even though they clearly should have received the protections embodied in the Lieber code. The resulting cycle of violence and large-scale hardships unnecessarily imposed on the civilian population is directly attributable to poor policy decisions by field commanders and failure to implement federal policy once it existed.

Still, the Lincoln administration's handling of this issue is instructive to the problems surrounding GWOT. Besides highlighting the need for clear, ethically driven guidance, Lincoln's example reminds us of the need to think expansively regarding humanitarian issues. He looked for reasons to *extend* combatant status, not reduce it. Lincoln tried to see beyond the immediate need to suppress insurgents to the longer-term effort to heal the nation. The Bush administration, focused understandably on the fight at hand, has missed this message entirely. It crafted a national-level policy destined for international condemnation and predictable abuses by American interrogators and prison guards.

The Bush administration should issue an executive order that temporarily classifies all detainees held by US military personnel as POWs, pending adjudication by a competent tribunal held to make internationally defensible decisions, the conduct of which should be coordinated with and approved by the International Committee of the Red Cross. As well, the order should direct the cessation of all coercive interrogation techniques, and support the passage of Senator John McCain's Amendment to the 2006 Defense Authorization Bill to incorporate Army Field Manual 34-52 as legally binding guidance for the conduct of interrogations.

These actions may not make the disastrous consequences of current policy fade away more quickly, but they should provide the foundation for American return to the high moral ground we expect of the government acting on our behalf.



## Endnotes

<sup>1</sup> Richard S. Brownlee, *Gray Ghosts of the Confederacy: Guerilla Warfare in the West* (Baton Rouge: Louisiana State University Press, 1973), 4.

<sup>2</sup>*Ibid.*, 6.

<sup>3</sup>*Ibid.*, 9.

<sup>4</sup>*Ibid.*, 16.

<sup>5</sup>Wiley Britton, *The Civil War on the Border, Vol. 1*. (New York: G.P. Putnam's Sons, 1890) 146. Britton, a Union Army Civil War Veteran himself, lost a brother at the hands of a Confederate guerilla fighter. No doubt this colored his views on the legitimacy of guerilla tactics. His two volume work however, collected during his post-war work evaluating war damage and pension claims all over the border areas, provides a fascinating narrative of the ebb and flow of conventional operations, as well as the concomitant guerilla activity.

<sup>6</sup>Robert R. Mackey, "The Uncivil War," Vol. 1. (Ph.D. diss., Texas A&M University, 2000), 16.

<sup>7</sup>Henry W. Halleck, *International Law or Rules Regulating the Intercourse of States in Peace and War* (New York: D. Van Nostrand, 1861), 9-10.

<sup>8</sup>Brownlee, 25.

<sup>9</sup>*Ibid.*, 26-27.

<sup>10</sup>James B. Martin, "The Third War: Irregular Warfare on the Western Border, 1861-1865," (Ph.D. diss., University of Texas at Austin, 1997), 54. Martin argues effectively that this order represented an important departure from the restraints implicit in 19<sup>th</sup> Century Warfare regarding treatment of captured enemy personnel.

<sup>11</sup>Brownlee, 36-37. This order also declared martial law in the entire state of Missouri and declared that those assisting the rebellion would have all property confiscated. The political outcry which followed, forced Lincoln to order Fremont to reverse part of his declaration.

<sup>12</sup>Carol B. Beamer, "Gray Ghostbusters: Eastern Theater Union Counterguerilla Operations in the Civil War, 1861-1865," (Ph.D. diss., Ohio State University, 1988), 63-64.

<sup>13</sup>Martin, 216-218.

<sup>14</sup>Wiley Britton, *The Civil War on the Border, Vol. II*. (New York: G.P. Putnam's Sons, 1899), 11-12.

<sup>15</sup>Mackey, 118.

<sup>16</sup>Britton, Vol., I, 2.

<sup>17</sup>*Ibid.*, 145-148.

<sup>18</sup>Beamer, 99-100.

<sup>19</sup>Britton, Vol. II, 139-147.

<sup>20</sup>Martin, 307-308.

<sup>21</sup>Martin, 7.

<sup>22</sup>Martin, 10-13.

<sup>23</sup>Mackey, 154.

<sup>24</sup>Beamer, 212-213.

<sup>25</sup>Ibid., 216.

<sup>26</sup>Mackey, 231-242.

<sup>27</sup>Ray Murphy, "Contemporary Challenges to the Implementation of International Humanitarian Law," *The Quarterly Journal* 3, no. 3 (September 2004): 101.

<sup>28</sup>Ibid. Francis Lieber was a professor of political science and law at Columbia. He was asked to draft the code by General Henry Halleck and it was promulgated in the War Department's General Order Number 100.

<sup>29</sup>Ibid.

<sup>30</sup>Daniel Moran, "Illegal Combatants and the Law of Armed Conflict," *Strategic Insight* (August 2002): 3.

<sup>31</sup>Murphy, 106.

<sup>32</sup>Ibid., 106-107.

<sup>33</sup>Moran, 3.

<sup>34</sup>OxResearch, "United States: Detainee Issue Sparks Controversy," 1 February 2002, available from <http://proquest.umi.com/pqdweb?did=567838591>.

<sup>35</sup>Sean D. Murphy, "Decision Not to Regard Persons Detained in Afghanistan as POWs," *The American Journal of International Law* 96 (April 2002): 2.

<sup>36</sup>Ibid.

<sup>37</sup>Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005), xiv.

<sup>38</sup>Thom Shanker and Katherine Q Seelye, "Who is a Prisoner of War? You Could Look It Up. Maybe," *New York Times*, 10 March 2002, sec. 4, p. 9.

<sup>39</sup>Murphy, 2-3.

<sup>40</sup>Murphy, 3.

<sup>41</sup>Greenberg and Dratel, 124-125.

<sup>42</sup>Gregory Hooks and Clayton Mosher, "Outrages Against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror," *Social Forces* 83, no. (June 2005): 1633.

<sup>43</sup>Greenberg and Dratel, xxi.

<sup>44</sup>Andrew Sullivan, "Atrocities in Plain Sight," *New York Times Book Review*, 23 January 2005, p.7-8.

<sup>45</sup>Mark Bowden, "The Dark Art of Interrogation," *The Atlantic Monthly* 292, no. 3 (October 2003): 60.

<sup>46</sup>Bowden, 75-76.

<sup>47</sup>"The Roots of Prisoner Abuse; [Editorial]," *New York Times*, 30 July 2005, sec. A, p. 14.

<sup>48</sup>Ralph R. Reiland, "Unlearned Prison Lessons," *The Humanist* 64, no. 4 (July/August 2004): 20.